No. 87-6571

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DETHORN GRAHAM,

Petitioner,

—v.—

M. S. CONNOR, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NORTH CAROLINA CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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INTEREST OF AMICI[1/]

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan, membership organization dedicated to defending the principles of individual liberty embodied in the Constitution. Those principles are primarily designed to structure the relationship between the individual and the state. Nothing ruptures that relationship so openly or so violently as the use of excessive police force. As a result, the ACLU and its affiliates around the country, including the affiliate in North Carolina, have long been concerned with devising an effective judicial remedy to deter police brutality. Because we believe the decision below jeopardizes that effort in unwar-

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1/ Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 36.2.

ranted ways, we respectfully submit this brief as amici curiae.

STATEMENT OF THE CASE

Amici adopt the statement of facts set forth in the petition for certiorari.

SUMMARY OF ARGUMENT

The issue in this case is whether a plaintiff who has been injured by a police officer's use of unreasonable and excessive force must also show that the police officer acted with malicious intent in order to recover for damages under 42 U.S.C. §1983.

In answering that question, the Fourth Circuit employed a substantive due process analysis that heavily relied on this Court's Eighth Amendment precedents. That approach is flawed for several reasons. At the outset, it is fundamentally inconsist-

ent with this Court's decision in Tennessee v. Garner, 471 U.S. 1 (1985), which applied the objective reasonableness standard of the Fourth Amendment to excessive force cases. To be sure, the excessive force in Garner resulted in death while the plaintiff in this case was fortunate enough to survive. However, there is no obvious reason why this difference in outcome should alter the constitutional framework under which these cases are analyzed, and the Fourth Circuit suggested none. A suspect who is held and beaten by police officers has been "seized" just as much as a suspect who is shot while fleeing. The difference is one of degree, not kind.

Moreover, subjective intent has never been a requisite element of proof in Fourth Amendment cases. To the contrary, this Court has increasingly focused on objective

reasonableness, even when evaluating a qualified immunity defense that ostensibly turns on an officer's "good faith." See Harlow v. Fitzgerald, 457 U.S. 800 (1982). In the Eighth Amendment context mistakenly relied on by the court below, subjective intent is relevant because constitutional liability depends on a finding that the incarcerated plaintiff has suffered "cruel and unusual punishment." See Estelle v. Gamble, 429 U.S. 97 (1976). Likewise, punishment may be a relevant touchstone in evaluating the rights of pre-trial detainees. See U.S. v. Salerno, 107 S.Ct. 2095 (1987). This case, however, involves neither convicted felons nor pre-trial detainees. Rather, it involves a classic street encounter in which the powers of the police have always been more circumscribed. For example, it is quite clear that the

Fourth Amendment is violated by a warrantless search whether the search was motivated by a sincere desire to discover evidence of crime or a malicious desire to invade the privacy of the homeowner. Punitive damages may be appropriate only in the latter instance; compensatory damages are appropriate in both.

Finally, the issue of objective reasonableness under the Fourth Amendment is, and should remain, a question for the jury. As demonstrated by this case, the question of reasonableness inevitably includes a series of predicate judgments that the jury is particularly well-suited to make. These include, but are certainly not limited to, such determinations as: What force was, in fact, applied? Under what circumstances? Did the plaintiff resist? And if so, to what extent?

Amici recognize that similar questions are occasionally resolved by the trial judge during the course of a suppression hearing. That allocation of function, however, is premised on the notion that the jury should not be exposed to evidence that it may later be obligated to ignore in its fact-finding role. This concern obviously does not apply when the reasonableness of the police officer's conduct is the central issue in the case. On that ultimate question, there is simply no basis for denying a plaintiff the right to a jury trial guaranteed by the Constitution.

ARGUMENT

I. THIS COURT HAS ALREADY DETERMINED THAT EXCESSIVE FORCE CASES SHOULD BE ANALYZED UNDER THE REASONABLENESS STANDARD OF THE FOURTH AMENDMENT

A. The Governing Legal Standard Was Announced By This Court In Tennessee v. Garner

This Court has already resolved the central legal issue presented by this case, and it has done so quite recently. Only three years ago, in Tennessee v. Garner, 471 U.S. 1 (1985), this Court applied the Fourth Amendment's reasonableness standard in reviewing a claim of excessive police force during the course of an arrest. No member of this Court dissented from that approach.[2/]

2/ In dissent, Justice O'Connor accepted the Fourth Amendment reasonableness standard but focused on probable cause as a central determinant of reasonableness. Garner, 471 U.S. at 27. In the instant case, it is undisputed that there was no probable cause to arrest.

This case presents another claim of excessive police force. Yet, inexplicably, the Garner decision was not even cited by the court below. Nor was it followed. Instead, the Fourth Circuit analyzed this case in substantive due process terms that heavily borrowed from this Court's Eighth Amendment jurisprudence. In so doing, the Fourth Circuit misconstrued both Garner and the Eighth Amendment. Its decision cannot stand so long as Garner remains good law.

The Court began its analysis in Garner with the undeniable observation that the use of deadly force to apprehend a suspected felon represents a "seizure" for Fourth Amendment purposes. As the Court noted:

> While it is not always clear just when minimal police interference becomes a seizure, there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.

471 U.S. at 7 (citation omitted).

Of course, not all seizures are unconstitutional. Accordingly, Garner recognizes that a court faced with a claim of excessive force must "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." Id. at 8. Furthermore, "[b]ecause one of the factors in a Fourth Amendment analysis is the extent of the intrusion, it is plain that [a final judgment on] reasonableness depends on not only when a seizure is made, but how it is carried out." Id.[3/]

3/ Twenty years ago, the Supreme Court highlighted the duality of Fourth Amendment analysis: "our inquiry is a dual one — whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." Terry v. Ohio, 392 U.S. 1, 20 (1968).

Applying these traditional Fourth Amendment rules, the Garner Court held that "[a] police officer may not seize an unarmed, nondangerous suspect by shooting him dead." Id. at 11. This holding was explicitly rooted in the reasonableness standard of the Fourth Amendment:

> The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.

Id.

B. The Logic Of Garner Is Not Limited To Deadly Force Cases

The use of deadly force obviously represents the most extreme seizure possible. However, as Garner itself makes clear, the use of deadly force is not a prerequisite to a Fourth Amendment claim.

"Whenever an officer restrains the freedom of a person to walk away, he has seized that person." Id. at 7. Indeed, that has been this Court's consistent position at least since Terry v. Ohio, 392 U.S. 1, 16 (1968).

It is hardly surprising, therefore, that in virtually every other case arising since Garner -- including other cases in the Fourth Circuit -- the reasonableness standard of the Fourth Amendment has been applied to excessive force cases whether or not they resulted in death. See e.g., Martin v. Gentile, 849 F.2d 863, 867 (4th Cir. 1988)(an excessive force claim is a claim which "quintessentially" invokes the protections of the Fourth Amendment, the only part of the Constitution that speaks directly to seizures of the person); Davis v. Little, 851 F.2d 605, 610 (2d Cir.

1988); Martin v. Malhoyt, 830 F.2d 237, 261 (D.C.Cir. 1987)("[w]hile Garner specifically addresses the use of deadly force, the language and logic of the opinion indicate that all police use of force in effecting arrests must meet an objective standard of reasonableness"); Lester v. Chicago, 830 F.2d 706, 711 (7th Cir. 1987) (citation omitted)("[a]lthough the issue in Garner was deadly force, implicit in its totality of circumstances approach is that police use of less than deadly force would violate the Fourth Amendment if not justified under the circumstances"). See also Jenkins v. Averett, 424 F.2d 1228, 1232 (4th Cir. 1970)(Fourth Amendment provides constitutional protection against the use of excessive force during arrest).

The facts of this case leave little room for doubt that plaintiff was "seized"

for Fourth Amendment purposes. As described in the dissenting opinion of Judge Butzner below:

> [T]he evidence discloses that the officer's investigatory stop revealed that Graham was unarmed, that he presented no danger to the public, and that no probable cause existed to believe he had committed a crime. Berry promptly told the officer that Graham was suffering from a sugar reaction. After Graham had run around the car twice, Berry and the investigating officer calmed him down as he sat on the curb. Another officer appeared and without inquiry about Graham's condition pushed Berry aside, rolled Graham over, and handcuffed him. A third officer arrived on the scene and opined: "I've seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with the M.F. but drunk. Lock the S.B. up." When Graham, restrained by handcuffs, asked an officer to look in his wallet for his diabetic decal, the officer told him to "shut up" and slammed his head against Berry's car . . . . A friend brought orange juice to the police car where Graham was confined in handcuffs. Graham asked the officer to give him the orange juice, and the officer responded "I'm not giving you shit." The officers took Graham to his home where he collapsed in the yard . . . . Graham suffered a head injury . . . . He also

> suffered injuries to his wrists, an injury to his shoulder, and a broken foot.

827 F.2d at 951-52.

Had Garner been followed, this case would not have been taken away from the jury at trial, see Point III, infra, and the question on appeal would have been the reasonableness of the police officers' conduct in light of all the circumstances. Because Garner was ignored, the Fourth Circuit focused instead on the presence or absence of malicious intent. That inquiry may be appropriate in an Eighth Amendment case. It has no place in the Fourth Amendment analysis dictated by this Court's decision in Garner.

C. Eighth Amendment Standards Do Not Apply To The Facts Of This Case

Even the Fourth Circuit recognized that the Eighth Amendment does not apply outside the prison context. 827 F.2d at

948 n.3. Using the rubric of substantive due process, the Fourth Circuit nonetheless applied Eighth Amendment standards to evaluate the street encounter between the plaintiff in this case and the Charlotte police. The approach followed below demonstrates a fundamental misunderstanding of this Court's Eighth Amendment case law and the very different interests at stake after a person has been incarcerated and before he or she has even been arrested.

It is true, as the Fourth Circuit pointed out, that a claim of excessive force in the prison context "ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" Whitley v. Albers, 475 U.S. 312, 320-21 (1986), quoting Johnson v. Glick, 481 F.2d

1028, 1033 (2d Cir.), cert. denied, 414 U.S. 1033 (1973). But the Fourth Circuit was plainly wrong in concluding that a single legal standard is appropriate regardless of the circumstances in which the excessive force is applied.

Indeed, this Court cautioned against that approach in Whitley itself:

> Because this case involves prison inmates rather than pretrial detainees or persons enjoying unrestricted liberty, we imply nothing as to the proper answer to that question outside the prison security context by holding, as we do, that in these circumstances the Due Process Clause affords . . . no greater protection than does the Cruel and Unusual Punishments Clause.

Id. at 327.

Moreover, this Court's interpretation of the Cruel and Unusual Punishments Clause has been directly and explicitly tied to the unique exigencies of the prison context. As this Court observed in Whitley:

> 'Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.' . . . That deference extends to a prison security measure taken in response to an actual confrontation with riotous inmates . . . It does not insulate from review actions taken in bad faith and for no legitimate purpose, but it requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice . . . . [C]ourts must determine whether the evidence goes beyond a mere dispute over the reasonableness of a particular use of force or the existence of arguably superior alternatives.

Id. at 321-22 (citation omitted).

These concerns are not germane outside the prison context and have never been extended by this Court beyond that context. In fact, this Court's decisions have always insisted on the very distinction that the Fourth Circuit's opinion attempts to ob-

scure. Thus, Whitley rejects a reasonableness standard inside the prison. Id. at 322. Garner, by contrast, demands a reasonableness standard outside the prison.

The Fourth Circuit decision represents bad history as well as bad law. The "malicious and sadistic" standard articulated in Johnson v. Glick, and adopted in Whitley, ultimately derives from Judge Friendly's interpretation of this Court's decision in Rochin v. California, 342 U.S. 165 (1952). Rochin, of course, announced a "shock the conscience" test in striking down the use of a stomach pump to obtain evidence from an arrested suspect. Rochin, however, was decided before the exclusionary rule was applied to the states in Mapp v. Ohio, 367 U.S. 643 (1961), and its reliance on substantive due process principles must be understood in those historical terms.

Since Mapp, this Court has consistently relied on the reasonableness standard of the Fourth Amendment when reviewing similar encounters between the police and their arrestees. E.g., Winston v. Lee, 470 U.S. 753 (1985); Schmerber v. California, 384 U.S. 757 (1966). See generally Comment, "Excessive Force Claims: Removing the Double Standard," 53 U.Chi.L.Rev. 1369, 1378-79 (1986).

The lower courts, by and large, have followed the same approach. Even the Second Circuit, which developed the "malicious and sadistic" standard in Johnson v. Glick, has recognized that excessive force cases arising on the street are now governed by the rule of reasonableness embodied in the Fourth Amendment. See Davis v. Little, 851 F.2d at 610 ("[t]he Fifth Amendment approach advocated by Judge

Friendly in Johnson v. Glick is no longer appropriately extended to excessive force claims that arise in the context of an arrest . . . ."). See also Martin v. Malhoyt, 830 F.2d at 261 n.76 ("Garner constrains us to conclude that due process analysis is not appropriately extended to excessive force claims").

II. THE MALICE STANDARD ADOPTED BELOW IS INCONSISTENT WITH BOTH THE LOGIC AND HISTORY OF THE FOURTH AMENDMENT

The decision below proposes a four-part test for excessive force cases. Under that test, a plaintiff's right to recovery depends on an assessment of (1) the need for force; (2) the amount of force used in relationship to that need; (3) the extent of any injury inflicted by the force; and (4) whether the force was inflicted "maliciously and sadistically for the very purpose of causing harm." 827 F.2d at 948.

Amici have no objection to the first two elements of this test, which largely restate the traditional balancing test of the Fourth Amendment. See e.g., United States v. Place, 462 U.S. 696, 703 (1983), quoted in Garner, 471 U.S. at 8. Amici also have no great objection to the third prong of the test, although it is arguably more relevant to the measure of damages than to the existence of a claim. The final prong of the test, however, introduces an element of subjective intent that cannot be reconciled with either the meaning or purpose of the Fourth Amendment.

As one commentator has noted:

> Although a showing of malice will invariably enhance the credibility of a claim, such a showing should not be set up as a prerequisite for all personal security claims based on the [F]ourth . . . [A]mendment[]. Because

> the [F]ourth [A]mendment standard is one of objective reasonableness, an official's state of mind only affects the determination of liability under claims based on the [E]ighth and [F]ourteenth [A]mendments.

Urbonya, "Establishing A Deprivation Of A Constitutional Right to Personal Security Under Section 1983: The Use Of Unjustified Force By State Officials In Violation Of The Fourth, Eighth, And Fourteenth Amendments," 51 Albany L.Rev. 173, 233 (1987).

Using somewhat different language, the Seventh Circuit reached a similar conclusion in Lester v. City of Chicago, 830 F.2d 706 (7th Cir. 1987). "An objectively unreasonable seizure violates the Constitution regardless of an officer's good intent; likewise, an objectively reasonable seizure does not violate the Constitution despite the officer's bad intent." Id. at 712, citing Scott v. United States, 436 U.S. 128, 137-38 (1978).

The emphasis on objective reasonableness is the hallmark of this Court's modern Fourth Amendment jurisprudence. Thus, even this Court's debates over the propriety of a "good faith" exception to the exclusionary rule have never suggested engrafting a good faith exception onto the Fourth Amendment itself. To the contrary, "[t]he question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." Illinois v. Gates, 462 U.S. 213, 223 (1983) (citations omitted). See also United States v. Calandra, 414 U.S. 338, 347 (1974)("the purpose of the exclusionary

rule is not to redress the injury to the privacy of the search victim").[4/]

Moreover, even the limited good faith exception to the exclusionary rule adopted in United States v. Leon, 468 U.S. 897, 919-20 (1984), turns on the objective reasonableness of the officer's reliance on the magistrate's warrant. The officer's subjective intent is not determinative; rather, the relevant inquiry is whether "the officer is acting as a reasonable officer would and should act in similar circumstances." Id at 920 (citation omit-

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4/ "[O]n occasion, the motive with which the officer conducts an illegal search may have some relevance in determining the propriety of applying the Exclusionary Rule . . . . This focus on intent, however, becomes relevant only after it has been determined that the Constitution was in fact violated." Scott v. United States, 436 U.S. at 139 n.13. The question of malice may also be relevant to the analytically distinct issue of punitive damages.

ted). See also 1 LaFave, Search and Seizure, §1.3(e) at 61 (2d ed. 1987).

The qualified immunity cases further illustrate this Court's focus on objective reasonableness under the Fourth Amendment. As this Court recently stressed, "an agent should prevail [on a qualified immunity defense] if he could prove 'not only that he believed, in good faith, that his conduct was lawful, but also that his belief was reasonable.'" Anderson v. Creighton, 107 S.Ct. 3034, 3046 (1987) (citation omitted). Furthermore, "the objective reasonableness of an official's conduct [is] measured by reference to clearly established law." Harlow v. Fitzgerald, 457 U.S. at 818.

The Fourth Circuit ignored this line of cases just as it ignored this Court's decision in Garner. The result is legally

incoherent. After Harlow, the officer's subjective good faith is irrelevant to the qualified immunity question once a Fourth Amendment violation is established. And yet, as a result of the decision below, a Fourth Amendment violation cannot be made out without first proving that the officer acted with malicious intent. The way out of this conundrum, of course, is simply to reaffirm what Garner already holds: malicious intent is not a prerequisite to an excessive force claim resting on the Fourth Amendment.

In short, nothing in the language, history or case law of the Fourth Amendment supports the malice standard adopted by the court below. The wording of the Fourth Amendment prohibits unreasonable conduct in searches and seizures. This is an objective standard that the Court can and has

applied in a variety of contexts -- for example, in judging (a) whether an officer acted reasonably in relying on a warrant not supported by probable cause,[5] (b) whether an officer has a good faith and reasonable belief that his conduct was lawful, thereby affording him the opportunity to assert an affirmative defense,[6] and (c) whether the police applied constitutionally reasonable force in seizing a suspect or citizen at liberty.[7] There is absolutely no reason to create a different rule here.

5/ United States v. Leon, 468 U.S. 897 (1984).

6/ Anderson v. Creighton, 107 S.Ct. 3034 (1987).

7/ Tennessee v. Garner, 471 U.S. 1 (1985).

III. FACTUAL ISSUES IN FOURTH AMENDMENT EXCESSIVE FORCE CASES MUST GO TO THE JURY

As previously noted, several Circuits have recently held that all claims of excessive force should be judged under a Fourth Amendment standard rather than the substantive due process standard favored by the court below. See e.g., Davis v. Little, 851 F.2d at 610; Lester v. City of Chicago, 830 F.2d at 710-713; Martin v. Malhoyt, 830 F.2d at 261 n.76. However, this is merely the first step in determining the reasonableness of force employed during a seizure. It is not enough to utilize the appropriate mode of analysis; in Fourth Amendment cases, factual issues must be submitted to the jury.

In the instant case, the Court of Appeals not only judged an excessive force claim under an erroneous standard, it

deprived the jury of an opportunity to decide whether excessive force was used. It is well settled that Fourth Amendment cases involve objective factual determinations. See Garner, 471 U.S. 1 (1985); Terry, 392 U.S. 1 (1968). Such determinations belong to the jury, not the judge. If a court usurps the power of the jury to determine factual issues, the Fourth Amendment guarantee is substantially diluted.

In the instant case, a directed verdict was entered against Mr. Graham. In its affirmance of the district court decision, the Court of Appeals concluded: "the evidence clearly indicates that at each stage of the incident, the actions of the officers were essentially reasonable under the circumstances." 827 F.2d at 949. Surely, given the state of this record, there is a factual dispute here.

In reviewing a directed verdict, a determination must be made as to whether there is evidence which would permit the jury to reach a verdict in favor of Mr. Graham. Id. Giving Mr. Graham the benefit of all reasonable inferences from the record, it is undisputed that he was unarmed; that he presented no danger to the public; that there was no probable cause to arrest him; and that the police were told promptly of Mr. Graham's sugar reaction. These factors must be weighed against the police officer's response to Mr. Graham's agitated state (due to his illness). The police handcuffed him; verbally abused him; banged his head against the hood of a car; and broke his foot.

We agree with Judge Butzer's observation, in dissent, that "[i]t was the jury's function -- not the court's -- to decide

which version [of the confrontation] to believe." Id. at 952. Indeed, the jury is particularly well equipped to decide excessive force cases for two very good reasons. First, such claims are essentially and inevitably contextual in nature.[8/] Second, the question of how much force was appropriate under the circumstances ultimately calls into question the values of the community. The jury is designed as an institution to express those values, albeit guided by suitable instructions from the judge on the relevant law.

Amici recognize that Fourth Amendment questions are occasionally resolved by the trial judge during the course of a suppression hearing. That allocation of function,

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8/ See Martin v. Gentile, 849 F.2d at 872 (Murnaghan, J., concurring in part and dissenting in part).

however, is premised on the notion that the jury should not be exposed to evidence that it may later be obligated to ignore in its fact-finding role. This concern obviously does not apply when the reasonableness of the police officer's conduct is the central issue in the case. On that ultimate question, there is simply no basis for denying a plaintiff the right to a jury trial guaranteed by the Constitution.

CONCLUSION

For the reasons stated herein, the decision below should be reversed and the case should be remanded to the district court for a new trial on the reasonableness of the police officer's conduct after the investigatory stop.

Respectfully submitted,

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